No. 84-701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE CITIZENS OF CHINCOTEAGUE FOR A REASONABLE WETLANDS POLICY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

To what extent are wetlands "waters of the United States" within the meaning of § 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7), and therefore subject to federal regulatory jurisdiction.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2, the Citizens of Chincoteague for a Reasonable Wetlands Policy file this brief as amici curiae in support of the respondent, Riverside Bayview Homes, Inc. Letters of consent from counsel for the parties have been filed with the Clerk.

No area of the United States is more directly affected by the issue of federal regulation of the discharge of fill material onto wetlands under the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, than the Island of Chincoteague, Virginia. Chincoteaque is the beneficiary of a substantial seafood industry which is dependent upon clean water and productive wetlands. Chincoteague is also dependent upon its tourist industry which requires reasonable utilization of its limited land mass. As a barrier island, Chincoteague is composed of a continuous series of upland ridges and lowland swales oriented north

to south. The lowland swales collect rain water run off which, combined with a high seasonal water table, results in ground water at or near the surface. These conditions, which change from year to year and from season to season, combined with a generally flat topography, make drainage difficult and result in vegetation commonly associated with fresh water wetlands. The topography of Chincoteague makes the upland ridges useless for reasonable economic development unless the low lying swales can also be filled. Without a reasonably balanced wetland policy which protects the waters for the fishing industry and at the same time permits development of the island land mass for its tourist industry, serious economic damage will result to the citizens of Chincoteague.

The Citizens of Chincoteague for a Reasonable Wetlands Policy is an unincorporated, non-profit organization of Chincoteague residents who have become concerned with the effect of the Section 404 program on the Island of Chincoteague. This brief is paid for by contributions from the citizens of Chincoteague because of their fear that the financial and legal resources of the Petitioner, United States of America (hereinafter "Government"), and amici curiae National Wildlife Federation, et al. (hereinafter "NWF), could result in a decision which does not consider the interests of affected small property owners.

The Government and the NWF claim that the Sixth Circuit's decision threatens the future ability of the Federal government to "protect ecologically important wetlands" (Pet. Brief at 14). They do not acknowledge that the wetlands which are the subject of this case, and which they "seek to preserve", are owned by individual citizens who under the Constitution have a protected and, therefore, vital interest in the proper resolution of this case.[1]

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[1] See, *Summa Corporation v. California ex rel. State Lands Commission and City of Los Angeles*, No. 82-708, 80 L.Ed. 2d 237 (April 17, 1984), where the Court recognized limits to intrusive governmental interference with private property rights.

STATEMENT

Riverside's land is comprised of one sixty acre parcel and a partially adjoining twenty acre parcel. The sixty acre parcel adjacent to Jefferson Avenue had been actively farmed through the early 1900's. (Pet. App. 22a). In 1916, it was platted as a subdivision, storm drains and fire hydrants were installed. (Pet. App. 22a). The adjacent twenty acre parcel has not been platted. In 1973, because of unprecedented high water levels in Lake Saint Clair, a dike was installed across the property, ditches were filled, and water was pumped onto Riverside's property, disrupting the normal drainage patterns. (Pet. App. 3a). As a result, a cattail swamp developed on that portion of the property which no longer had proper drainage. (Pet. App. 29a).

Expert witnesses testifying at trial stated that the soil type and lack of proper drainage caused the wetland conditions found at the property. (Pet. App. 24a, 25a). Hydrologic studies conducted on the property yielded conflicting results: one expert being of the opinion that there was a hydrologic connection between Lake Saint Clair and the property, while another expert testified that there was no hydrologic connection. (Pet. App. 24a). The District Court found as a matter of fact that there was no hydrologic connection between the property and Lake Saint Clair. (Pet. App. 25a, 37a).[2]

The District Court had great difficulty applying the Section 404 regulations to the facts in Riverside's case. Judge Kennedy, recognizing that her decision was of necessity "somewhat arbitrary",[3] held that under the

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[2] The Government, after failing in the District Court to raise the issue of "saturation", as defined in the Corps regulations at 33 C.F.R. 323.2(c) asks this Court for the first time on appeal to address this issue. (Pet. Brief at 44-45) Such a request by the Government comes too late and this Court is not in a position to make a finding of fact not made by the District Court.

[3] The District Court was immediately confronted with a central issue presented to this Court by the Government and NWF, i.e., when science and constitutional limitations are in conflict, should

1975 regulations Riverside's property above elevation 575.5 was uplands and that portion of the property below qualified as wetlands. (Pet. App. 31a). Judge Kennedy further held that areas of Riverside's property landward of the 575.5 elevation line could be filled despite the existence of wetlands vegetation and other wetlands characteristics. (Pet. App. 31a).

While the case was on appeal to the Sixth Circuit, the Army Corps of Engineers (hereinafter the "Corps") revised its Section 404 regulations. The Corps' new wetlands definition eliminated the requirement of periodic inundation and required only saturation by surface waters, which can be tide, flood or rainwater and ground water. The Sixth Circuit remanded the case for a factual determination applying the Corps' 1977 wetlands definition. (Pet. App. 42a). On remand, Judge Gilmore, without hearing additional evidence, determined that "as redefined by 33 C.F.R. 323.2(c), the Army Corp of Engineers definition of 'waters of the United States' is broader than its predecessor". (Pet. App. 43a). Judge Gilmore reaffirmed Judge Kennedy's ruling that all lands below elevation 575.5 were subject to jurisdiction under the Clean Water Act, 33 U.S.C. 1344, and the Corps' 1977 regulations. (Pet. App. 43a).

On appeal the Sixth Circuit held that "neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former." (Pet. App. 10a). The Sixth Circuit held that the proper interpretation of the words "inundated at a frequency and duration sufficient to support, and that under normal circumstances (does) support wetlands vegetation" requires frequent flooding by waters flowing from "navigable waters" as defined in the Act. (Pet. App. 10a,

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the requirements of the constitution bend to accommodate science or must science bend to accommodate constitutional limitations. (Pet. Brief at 37-39; NWF Brief at 18-21). As further discussed below, Congress cannot extend its regulatory authority beyond the authority granted it under the Constitution.

15a). Accordingly, the Sixth Circuit held that the definition applies to marsh, swamps and bogs directly created by such waters, but not inland low lying areas such as the one in question in this case, which sometimes become saturated with water. (Pet. App. 15a).

SUMMARY OF ARGUMENT

The Citizens of Chincoteague believe that the decision of the Sixth Circuit is correct and should be affirmed as it recognizes the distinction between *inundated* wetlands formed by waters of the United States, a prerequisite if jurisdiction is to exist under the Commerce Clause of the Constitution, and *non-inundated* wetlands formed by ground or surface water in association with poor drainage which are beyond the reach of the Commerce Clause. Reversal by this Court would effectively remove any barriers to federal regulation under the Commerce Cause and leave it a legal concept in name only. The Sixth Circuit's decision recognizes and reasonably balances the competing environmental concerns while preserving the integrity of the Commerce Clause. *Inundated* wetlands directly formed by waters of the United States constitute the major significant wetlands having characteristics generally accepted as most valuable to the environment as a whole, while *non-inundated*, isolated wetlands of the type located upon Riverside's property have the least. Finally, the Sixth Circuit's decision, while not so holding, recognized the real danger of unconstitutional takings resulting when authority under the Commerce Clause is exceeded and the regulations and permitting process developed under the Clean Water Act are used as a vehicle to ensure preservation of wetlands located upon private property, rather than to promote Congress' water quality goals.

I. WHEN CONGRESS PASSED THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS IN 1972, THE EXPRESS PURPOSE OF THE ACT WAS TO CONTROL POLLUTION OF THE NATION'S WATERS AT THE POINT SOURCE AND NOT TO ESTABLISH A FEDERAL LAND USE PROGRAM TO PRESERVE WETLANDS.

The Federal Water Pollution Control Act Amendments of 1972 (hereinafter FWPCA), 33 U.S.C. 1251 *et seq.*, were enacted to ". . . restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As the statutory goals in the FWPCA expressly demonstrate, Congress was concerned with water quality. *See, e.g.*, 33 U.S.C. 1251(a)(1) ("That the discharge of pollutants into the navigable waters be eliminated by 1985.") To achieve these goals, the FWPCA provided for federal regulatory supervision over water polluting activities from point sources: Section 402, 33 U.S.C. 1342, established the national pollutant discharge elimination system (NPDES) to apply effluent standards for particular discharges; Section 403, 33 U.S.C. 1343, established a program to regulate ocean dumping; Section 404, 33 U.S.C. 1344, established a permitting process to regulate the discharge of dredge and fill material into navigable waters. It is this latter program, Section 404, which is at issue in the instant case.

Section 301(a) of the FWPCA, 33 U.S.C. 1311(a), makes it unlawful to discharge any pollutant into the waters of the United States without a Section 402 (Rivers and Harbors Act, 33 U.S.C. 401-413) or Section 404 (FWPCA dredge and fill) permit. Pollutant is defined in Section 502(6) of the FWPCA, 33 U.S.C. 1362(6), when it is ". . . discharged into waters." Section 404 provides that "the Secretary of the Army, acting through the Chief of Engineers, may issues permits, after notice and opportunity for public hearings for the discharge of dredged of fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344.[4]

Section 502(7) of the FWPCA, 33 U.S.C. 1362(7), defined "navigable waters" as "the waters of the United States, including the territorial seas." The Corps, pursuant to its authority under the FWPCA, published regulations defining its jurisdiction over "navigable waters" as extending to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future, susceptible for use for purpose of interstate or foreign commerce." 33 C.F.R. 209-120(d)(1) (1974).

In 1975, in ruling on a suit brought by the National Resources Defense Council and the National Wildlife Federation against the Secretary of the Army, the District Court for the District of Columbia issued a short opinion granting partial summary judgment. In its brief discussion of the scope of the Corps' regulations under Section 404, the court stated:

> Congress, by defining "navigable waters" in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251 et. seq. (the "Water Act") to mean "the waters of the United States, including the territorial seas", asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability. [*NRDC v. Callaway*, 392 F.Supp. 385, 386 (D.D.C. 1975)]

While explicitly acknowledging that the regulatory authority of Congress was limited by the Commerce Clause and making no reference to wetlands, the Court ordered

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[4] The Corps administered the Rivers and Harbors Act, 33 U.S.C. 401-413, while the Environmental Protection Agency (hereinafter "EPA") was given general responsibility for administering the FWPCA. To eliminate the potential jurisdictional overlap and maintain the Corps' traditional jurisdiction, the Corps was given authority to issue Section 404 permits. 118 Cong. Rec. 33699 (1972).

the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Id.* at 386. The Corps did not appeal this order and the District Court did not rule upon the constitutionality of the resulting regulations.

The Corps responded by publishing interim regulations in July of 1975 to "phase-in" expansion of its Section 404 jurisdiction. In administratively defining "navigable waters", the 1975 regulations, for the first time, included certain wetlands as "waters of the United States" and, therefore, subject to Section 404 jurisdiction. As explained in the regulations, "waters of the United States" included:

> (b) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth or reproduction.
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> • • • •
>
> (h) Freshwater wetlands including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support vegetation. "Freshwater wetlands" means those areas that are inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction. [33 C.F.R. 209.120(d)(2)(1975)]

On July 19, 1977 the Corps promulgated new regulations that again expanded the Section 404 permit jurisdiction over wetlands not previously defined as falling within the term "waters of the United States".[5] They

[5] While the Government contends that the Corps simply "revised the 1976 interim final regulations to clarify many of the definitional terms" (Govt's Brief at 6), it is clear that the 1977 regulations greatly expanded the Corps jurisdictional authority. On remand from the Sixth Circuit, the District Court explicitly concluded that "as redefined by 33 C.F.R. 323.2(c), the Army Corps of Engineers' definition of 'waters of the United States' is broader than its predecessor". (Pet. App. 43a)

defined "navigable waters of the United States", at 33 C.F.R. 323.2(a), as encompassing (1) traditionally navigable waters, (2) the tributaries of all such navigable waters, (3) interstate waters, whether or not navigable, (4) the tributaries of all such waters, and (5) "all other waters of the United States not identified in paragraphs (1)-(4) above . . . the degradation or destruction of which could affect interstate commerce", 33 C.F.R. 323.2(a)(1-5) (1977). Further, all "adjacent wetlands" to the waters defined in paragraphs (1)-(4) were included as "waters of the United States". These terms were defined in the regulations as:

> (c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.
>
> (d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands". [33 C.F.R. 323.2(c) and (d) (1977)]

Amicus curiae contend, that Congress' failure to clearly define the term "waters of the United States", and the subsequent incorporation by federal agencies of an overbroad definition of "wetlands" into that term, renders enforcement of the FWPCA unconstitutional. Because Congress failed to establish jurisdictional limits to the Section 404 program, leaving the executive branch of government to do so by regulation, this Court must not permit federal agencies to overstep their Constitutional authority and extend federal regulatory jurisdiction beyond permissible bounds.

A. The Corps' extension of its Section 404 jurisdiction to all wetlands "saturated by surface or ground water" resulted from the unconstitutional delegation of Congress' legislative function to the executive and judicial branches of Government.

As mentioned previously, Congress intended that the FWPCA[6] be enforced to the "maximum constitutional limit", but it left the Corps to define its own jurisdiction. *Amicus curiae* contend that the failure of Congress to prescribe jurisdictional limits constitutes a fatal constitutional flaw.

In enacting the 1972 Amendments to the Clean Water Act, Congress failed to "lay down . . . an intelligible principle to which [an executive agency] is directed to conform," thereby unconstitutionally delegating its legislative power. *Hampton & Co. v. United States*, 275 U.S. 400, 409 (1928). By simply redefining "navigable waters" as "waters of the United States, including the territorial seas", 33 U.S.C. 1362(7), Congress failed to provide such an intelligible principle. Courts have recognized the lack of guidance and expressed their frustration with Congress' overbroad delegation. *See, e.g., United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983) ("It may be that the extravagant reach of the regulations would raise serious problems under some . . . situations."); *Froehlke v. Leslie Salt Co.*, 578 F.2d 742, 756 (9th Cir. 1978) ("We express no opinion on the outer limits to which the Corps' jurisdiction under the FWPCA might extend").

Throughout its brief, the Government fails to appreciate that Congress may not "abdicate or transfer to others the essential legislative functions with which it it vested." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1939). *Congress has never included wetlands within the definition of waters to be regulated under the Clean Water Act.* The first efforts by the Corps

[6] The 1977 Amendments to the FWPCA changed the popular name of the FWPCA to the Clean Water Act, which will be used henceforth.

to regulate the discharge of dredged or fill material onto wetlands came not from a specific legislative directive from Congress, the body elected by the citizens and charged by the Constitution with that responsibility, but from a federal regulatory agency itself. *See*, 40 Fed. Reg. 31320 (1975).

The Government makes much of the fact that Congress passed Amendments to the Clean Water Act in 1977. The Government asserts that Congress thereby ratified the Corps' regulations of July 19, 1977 extending Section 404 jurisdiction over land characterized by "saturated soil" conditions, contending that Congress retroactively expressed its intent that the Corps exercise jurisdiction over all "wetlands". (Pet. Brief at 25). In support of this proposition, the Government cites *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), in which this Court upheld the FCC's regulations concerning fairness in broadcasting requirements. This case is readily distinguishable, however, as the Court's opinion stressed that "Congress has not just kept its silence by refusing to overturn the administrative construction, but has *ratified it with positive legislation*". 395 U.S. at 381-382. (Emphasis added) The Court went on to state:

> When the Congress ratified the FCC's implication of a fairness doctrine in 1959, it did not, of course, approve every past decision or pronouncement by the Commission on this subject, *or give it a completely free hand for the future.* The statutory authority does not go that far. 395 U.S. at 385 (Emphasis added)

The 1977 Amendments did not mention in any way the Clean Water Act's definition of "navigable waters". The only mention of wetlands came in an administrative provision allowing for state assumption of the Section 404 program, 33 U.S.C. 1333(g). Nowhere in the Clean Water Act has Congress implied that land with no connection to "navigable waters" be encompassed by the Section 404 program. Unlike the *Red Lion* case, Congress

has never positively addressed the Corps' Section 404 jurisdiction, let alone through legislative act ratified the Corps' interpretation of its jurisdiction. There are, however, interesting parallels between the issues before the Court in *Red Lion*, and the instant case. If this Court is to uphold the Corps' extension of its Section 404 jurisdiction to all private property characterized by saturated soil, from whatever cause, the private property of all landowners will be turned into a public trust just as surely as were the airwaves in *Red Lion*.

The Government also cites *Bob Jones University v. United States*, 461 U.S. 574 (1983), in support of its proposition that Congress retroactively expressed its intent to extend Section 404 permit jurisdiction to land characterized by "saturated soil." The cited portion of *Bob Jones*, however, stands only for the unremarkable proposition that the general words of a statute cannot be construed to defeat the intent of Congress and that the interpretation of the regulatory agency charged with administering a program is due proper deference from a reviewing court. 461 U.S. at 599-602. The Government's reliance upon the *Bob Jones* decision is misplaced, as the Government fails to acknowledge that the principle of deference to an agency's interpretation is inappropriate where that interpretation has not been consistent. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *SEC v. Sloan*, 436 U.S. 103, 121 (1978). As the Corps' regulations clearly demonstrate, the Corps has been far from consistent in its interpretation of its Section 404 jurisdiction over wetlands.

It is a settled principle that Congress cannot manifest its intent through silence. *Regional Rail Reorganization Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967). Had Congress intended Section 404 jurisdiction to extend to "wetlands" not connected to "navigable waters" it would have so provided. At no time, however, has Congress done so. Congress has never expressed an intention that the Clean Water Act be used to assert federal jurisdiction over non-inundated land unconnected to "navigable waters".

Congress' failure to provide "an intelligible principle" to guide the federal regulatory agencies charged with administering the Clean Water Act has resulted in the "abdication" of its "essential legislative function", rendering the application of the Section 404 program unconstitutional. Congress, not the Corps, must make the policy choices required in national legislation.

B. The 1977 regulations extended federal regulatory power beyond the permissible limits of the Commerce Clause.

The Government's position before this Court represents an attempted assertion of federal regulatory authority that exceeds the permissible limits of the Commerce Clause. The July 19, 1977 Corps regulations have completely forsaken the requirement of a nexus between interstate commerce and legislative purpose required by the Constitution.

The Commerce Clause states that Congress may "[r]egulate Commerce with foreign Nations and among the several states, and with the Indian tribes." U.S. Const. Art. I, § 8, cl. 3. To say that Congress intended that "navigable waters be given the broadest possible constitutional interpretation", 118 Cong. Rec. 33699 (1972) and that the Clean Water Act be enforced to the "maximum extent permissible under the Commerce Clause," *Callaway, supra*, at 856, is to definitionally acknowledge that there are constitutional limits upon Congress' Commerce Clause powers.

In *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), this Court deliniated the function of judicial review of Commerce Clause legislation as a determination of whether Congress has a rational basis for "finding that a regulated activity affects interstate commerce" and whether the means Congress has chosen are "reasonably adapted to the end permitted by the Constitution". *Hodel*, 452 U.S. at 276, citing

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 262 (1964). In articulating this test the Court noted that mere invocation of the Commerce Clause will not trigger federal jurisdiction. Instead, "Congress must show that the activity it seeks to regulate has a *substantial* effect on interstate commerce". 452 U.S. at 313 (Rehnquist, J., concurring) (Emphasis added).

The *Hodel* Court respected long standing precedent in holding that:

> In light of the evidence available to Congress and the detailed consideration that the legislation received, we cannot say that Congress did not have a rational basis for concluding that surface coal mining has *substantial effects on interstate commerce. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, at 280 (1981) (Emphasis added)

Congress cannot regulate an activity without a demonstration that the activity "affects" commerce in some meaningful way. *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968) (Congress may not "use a relatively trivial impact on commerce as an excuse for a broad general regulation of state or private activity"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 258 (local activities which have "a substantial and harmful effect upon that commerce" may be federally regulated); *Wickard v. Filburn*, 317 U.S. 111, 125 (1944) (local activity may be regulated if "it exerts a substantial economic effect on interstate commerce").

This Court cannot sustain the Corps' overbroad wetland regulations, subjecting to Section 404 permit jurisdiction all private land "saturated by surface or ground water", as a proper exercise of Congress' Commerce Clause powers. While the Corps' regulations ostensibly demonstrate concern to preserve wetlands for their "ecological" and "habitat" value, Congress has never determined that the discharge of dredge or fill material onto lands "inundated or saturated by surface or ground water" is an activity that "affects" interstate commerce,

substantially or otherwise, or has any effect upon water quality, its stated legislative goal.

As previously discussed the Clean Water Act, as amended by Congress in 1972, regulates the discharge of pollutants from point sources into the navigable waters. As Congress' concern was water quality "navigable waters" was statutorily defined as "waters of the United States", 33 U.S.C. 1362(7), in order to extend the reach of the Clean Water Act further than the traditional definition of navigable waters.[7] At no time, however, did Congress express its intention that all wetlands, let alone land "saturated by surface or ground water", be subjected to the Section 404 permitting process.

The Corps' 1977 redefinition of wetlands to include areas of vegetation resulting from "surface or ground water", including isolated wetlands such as those in the instant case, represents a substantial increase in alleged federal jurisdiction to include much of the land mass of the United States. This regulation constitutes a clear and distinct break of the Commerce Clause nexus and places under federal regulatory jurisdiction all wetlands regardless of their connection to the navigable waters of the United States. By administrative regulation, not legislation, these wetlands are now included within the term "waters of the United States".

Amicus curiae believe that the Sixth Circuit's decision holding that those areas subject to federal regula-

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[7] The Corp's traditional jurisdiction over navigable waters, codified at 33 C.F.R. 323.2(b), was developed from this Court's decisions in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) (waters navigable in fact and used, or susceptible of use, in their ordinary condition, for commerce); *The Montello*, 87 U.S. (21 Wall.) 430 (1874) (extended to waters capable of use, though not actually used, in commerce); *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1921) (non-navigable portions of navigable waterbodies); *United States v. Appalachain Electric Power Co.*, 311 U.S. 377 (1940) (waters that, through reasonable improvement, could be made navigable); and, *Oklahoma ex rel. Phillips v. Guy F. Atcheson Co.*, 313 U.S. 508 (1941) (non-navigable tributaries of navigable waters).

tory jurisdiction must be limited to areas so frequently inundated by waters of the United States as to make them also a part of waters of the United States is correct. To rule otherwise would ignore the fact that Congress has never determined that land "inundated or saturated by surface or ground water" has any connection to interstate commerce and effectively render the Commerce Clause meaningless.

II. THE CORPS' REGULATIONS RESULT IN A TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

A. Regulation which denies a property owner of viable, beneficial use of his land constitutes a taking under the Fifth Amendment.

The Clean Water Act has been moulded by the executive branch into regulations containing a permitting process typical of zoning and land use regulation available only to the states under their general police power jurisdiction. *See, Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The permitting policies of the Corps have evolved into an extensive public interest review process, considering such factors as:

> ". . . conservation, economics, aesthetics, general environmental concerns, historic values, flood damage protection, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people". [33 C.F.R. 320.4(a)(1)]

When these regulations are coupled with the Corps' expanded definition of wetlands as land "inundated or saturated by surface or ground water", 33 C.F.R. 323.2 (b)(2), the Corps' implementation of its Section 404 program results in a policy of extensive federal land use regulation that does not consider as significant the protected interest of the property owner.

This pervasive regulatory structure, purportedly authorized under the Commerce Clause, raises serious "taking" concerns under the Fifth Amendment of the Constitution of the United States. As the Sixth Circuit observed, "A very real taking problem [is raised] with the exercise of such apparently unbounded jurisdiction by the Corps" (Pet. App. 15a). This observation was underscored by the United States Claims Court in its recent decision in *Florida Rock Industries, Inc. v. United States*, No. 266-82L (U.S. Claims Court, filed May 6, 1985). In that case, the Claims Court held that denial of a Section 404 permit to a company wishing to mine phosphate constituted a Fifth Amendment taking for which compensation was due. After noting that the federal government has a program to preserve wetlands deemed ecologically important by compensating the property owner,[8] to conserve wetlands, the Claims Court evaluated the Fifth Amendment "taking" issue by noting:

> The difficulty arises because the property in question does not belong to the public but to the plaintiff. It may be perfectly appropriate to consider only the public interest factors when determining the use of public land. However, when government treats private land as if it were its own, ignoring the interests of the property owner and rendering the property economically useless, it has worked a taking and, under our constitution, compensation is due." [*Florida Rock, slip op.* at 24.]

The Claims Court's analysis in *Florida Rock*, is fully compatible with this Court's decision in *Chicago R.I. & P.R. Co. v. United States*, 284 U.S. 80 (1931), in which this Court ruled that "confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title." 284 U.S. at 96. This Court has long held to the principle that "if regulation goes too far it will be recognized as a taking".

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[8] "Most interestingly though, is the Water Bank Act. Under this Act, Congress recognized that it is in the public interest to preserve, restore and improve the wetlands of the Nation, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources. 16 U.S.C. § 1301 (1982)". [*Florida Rock, slip op.* at 22].

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *Accord, Agins v. City of Tiburon*, 447 U.S. 225 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). In *Kaiser Aetna v. United States*, 444 U.S. 154 (1979) this Court reiterated this principle in holding that the exercise of federal regulatory authority to require the owners of a private marina to allow free public access would have amounted to a taking for which compensation would be due. 444 U.S. at 345.

Riverside finds itself in precisely the same situation as the plaintiff in *Florida Rock, supra*, as the Corps' assertion of Section 404 jurisdiction over its property and denial of a Section 404 permit effectively forces it to preserve its property in a natural state. The Claims Court specifically noted that any construction connected with alternative uses of the land at issue would require a Section 404 permit and made a finding of fact that "it is unthinkable that the Corps would issue such a permit in light of its denial of plaintiff's application." *Florida Rock*, slip op. at 4 (footnote omitted). It specifically held that "denial of the [Section 404] permit therefore has deprived plaintiff of all economically viable use of it land." *Id., slip op.* at 5.

The Sixth Circuit's recognition of a "very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps" was well founded and fully consistent with settled Fifth Amendment analysis. *Ruckelshaus v. Monsanto Co.*, No. 83-196, 81 L.Ed. 2d 815, 833-834 (June 26, 1984) (Government action short of acquisition of title or occupancy can work a taking if its effect is to deprive the owner of all or most of his interest in the subject matter); *San Diego Gas v. City of San Diego*, 450 U.S. 621, 651 (1981) (Dissenting opinion by Justices Brennan, Stewart, Marshall and Powell) ("taking" may occur without a formal condemnation proceeding or transfer of fee simple); *Agins*, 447 U.S. at 262 (1980) (Fifth Amendment taking occurs when governmental regulation "denies an owner economically viable use of his lands").

Amicus curiae contend that the federal regulatory agencies have utilized the Section 404 program as a federal land use mechanism in violation of the Fifth Amendment requirement of just compensation for governmental taking of private property.

B. Application of the Corps' regulations results in an unconstitutional Fifth Amendment taking of private property.

The Sixth Circuit addressed a major concern of the Citizens of Chincoteague in recognizing that the interjection of federal jurisdiction into the backyards of every citizen may result in an unconstitutional "taking" of property. Nowhere is this concern better appreciated and understood than on the Island of Chincoteague which includes many low-lying damp areas that might be considered "wetlands" under the Corps' far reaching definition.

The Government and the NWF state that wetlands of the United States and wetlands of the States will be lost if this Court does not reverse the decision in this case. (Pet. Brief at 40 and NWF Brief at 19) They assert that reversal will permit the preservation of these vast wetlands areas. If the permitting process is, as they assert, merely a permitting process and not a regulatory taking, how will their objective of preservation of these wetlands result? The answer is found in the regulations of the Corps where, once jurisdiction is established, a property owner is no longer free to put his property to any economically viable or beneficial use that he may choose. At that point, *all* choice of use is transferred to the Corps and as will be discussed, the Corps is predisposed under the regulations towards not allowing any reasonable use of property that it determines is a wetlands.

The Government argues that a taking of private property does not arise from the mere assertion of regulatory

authority to require an application for a permit. (Pet. Brief at 30-32). In this case, however, the Corps' permitting system is designed to preclude alternative, beneficial uses to property owners of land "administratively defined" as wetlands. Instead, the permitting process of the Corps is designed to deny permit requests or to grant permits only under very limited circumstances, thereby making the total use restrictions imposed at the onset of the Corps' jurisdiction permanent.

The Government has asserted in its brief that a Corps permit will be issued if the proposed activity complies with the guidelines issued under 404(b) of the Act, 33 U.S.C. 1344(b), and is otherwise not contrary to the public interest. (Pet. Brief at 40). The problem with the Government's proposition is that the Corps' regulations predetermine that the filling of wetlands is not in the public interest. The Corps' regulations direct that "[n]o permit will be granted unless its issuance is found to be in the public interest." 33 C.F.R. 320.4(a). The section immediately following states in turn, that "*[w]etlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.*" 33 C.F.R. 320.4(b) (Emphasis added). This regulatory predetermination that the filling of wetlands is not in the public interest raises an insurmountable barrier for a property owner to overcome in attempting to obtain a fill permit. If it is not in the public interest to fill wetlands and a citizen files a permit application to fill wetlands, then the permit must be denied because it is not in the public interest.

In an attempt to avoid this conclusion, the Government argues that it is only fill proposals requiring an unnecessary alteration of wetlands that the permitting program is designed to prohibit. (Pet. Brief at 11, 42) The fallacy of the Government's argument lies in the Corps' regulations, which set forth criteria to be used in determining what projects constitute a necessary filling. Under this criteria no realistic proposals can qualify for

a permit. The relevant Corps' regulations, 33 C.F.R. 320.4(b)(4), and those of the EPA, 40 C.F.R. 230.10 (a)(3) address what the Corps considers to be a *necessary* alteration.[9] These sections provide that no permit will be granted unless two requirements are met: the proposed use must be water dependent; *and* there can be no other practicable alternative sites available.

The requirement of water dependency may be reasonable in the case of a project proposal for a frequently inundated wetland, as a frequently inundated wetland is connected to a waterbody. However, this requirement is totally unreasonable when applied to a non-inundated wetland like Riverside's property because the non-inundated wetland is not connected to a waterbody. Logic dictates that a water dependent project would not be located on a site that is not connected to a waterbody. The only realistic project proposal for a non-inundated wetland would be one that was not water dependent which, in accordance with the Corps' and EPA's regulations, has already been predetermined to be an unnecessary alteration of a wetland and therefore, not in the public interest.

The second requirement under 33 C.F.R. 320(b)(4) and 40 C.F.R. 230.10(a) that there be no alternative site

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[9] 33 C.F.R. 320(b)(4) states:

> No permit will be granted to work in wetlands identified as important by subparagraph (2), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (a) above, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits. *In evaluating whether a particular alteration is necessary, the District Engineer shall consider whether the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment and whether feasible alternative sites are available.* (Emphasis added).

EPA's regulation 40 C.F.R. 230.10(a)(3) has a similar requirement:

> no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.

The current regulations of both agencies are substantially unchanged versions of the 1977 regulations.

available for the proposed use is equally unreasonable. The Government acknowledges that the regulations presume that there are alternative sites for *all* proposed uses, with the property owner having the burden of overcoming this presumption. (Pet. Brief at 41). *Amicus curiae* submits that there are very few, if any, non-water dependent projects where there are no practicable alternative sites available for the proposed use. As such, the presumption imposed by the Corps and EPA regulations is impossible to overcome. This impossibility, coupled with the unreasonable requirement of water dependency, has the effect of preventing any realistic economic or beneficial use of property such as Riverside's.

In summary, the Corps' establishment of jurisdiction over private property effectively removes one of the fundamental constitutionally protected rights of ownership, the right of the property owner to put his land to some economically viable or beneficial use. The permitting process, being heavily biased against granting a permit for any realistic economic or beneficial use, does nothing to cure the regulatory taking that results from the total restrictions on *all* uses that are imposed at the onset of the Corps' jurisdiction over the property of a citizen.

III. THE FEAR THAT THE SIXTH CIRCUIT EXPRESSED CONCERNING THE POTENTIAL FOR TAKING BY INTERJECTION OF THE CORPS' JURISDICTION INTO THE BACKYARDS OF EVERY CITIZEN IS WELL FOUNDED.

There are an infinite number of sites throughout this country, including many on Chincoteague, that have low lying damp areas which could qualify as "wetlands" under the Corps' extremely broad definition. The following are just a few examples of the types of "takings" effectuated by the Corps under the Section 404 permit requirements upon some of our citizens.

1. Mr. and Mrs. Lawrence Ransley purchased Lot 23, located in the Pinedale-Rosedale Subdivision of Chincoteague to build their home. This subdivision contains

31 lots and is bounded by Ridge Road and Division Street. Lot 23 is also bounded by Pinedale Drive and Rosedale Drive. Mr. and Mrs. Ransley's inland property is located in an upland area of Chincoteague not in the vicinity of any waters of the United States. It includes a low area 30 feet wide by 100 feet long which, because of poor drainage supports cattails and other wetland vegetation. In order to build their home, it was necessary for the Ransleys to fill this area. They were advised by the Corps that a permit was required. They applied to all state and local wetlands agencies and were advised that a permit was not necessary. The Corps processed their application and on January 24, 1985, denied their permit request claiming it was necessary "based on a public interest review, to deny the project as proposed due to the lack of a justifiable need to destroy valuable wetlands." As a result, Mr. and Mrs. Ransley have been barred from building their house on Lot 23.

2. In 1969, three years before the FWPCA was enacted, Richard and Carolyn Conklin purchased upland property located in a developed residential area near the center of Chincoteague. They began constructing a row of townhouses on the property in early 1982. On September 9, 1983 they received a Formal Cease and Desist Order from the Corps advising them that they had filled wetlands within their regulatory jurisdiction. The order gave them fifteen days to remove the fill. The cease and desist order pertained to an approximately 100 x 100 foot area which can be described as a sink hole with a lower topography that contained trash and other debris. The Corps described the area as a wetland relatively small in size, isolated by surrounding upland and cut off from any inundation. The Corps admitted that even without any filling by the Conklins, the wetland vegetation probably would have decreased in time due to its isolation.

Upon receiving the cease and desist order, the Conklins agreed to submit an After-the-Fact Application for au-

thorization to fill and also agreed to the Corps' demands for mitigation. Mitigation as practiced by the Corps and its consulting environmental agencies requires that a property owner requesting a permit bulldoze uplands and make them into wetlands as the price for receiving a permit.

Mitigation in this case required the purchase of two parcels of property totalling more than 10,000 square feet, clearing off all trees and other upland vegetation, lowering the elevation of the land to a point which would allow tidal waters to flood the land and then planting and fertilizing 8,999 spartina alternaflora sprigs and 361 Iva frutescens plants, thereby creating two man-made bogs out of what was before high and dry land.

3. Terry and Debra Combs, Jay and Barbara Mason, Teri and Dana Gorner, George and Linda Hall, James and Nancy Adams, William and Patricia Jones, Richard and Rosemary Merrill, David and Elaine Fioriglio, Kruno Flipic, James Jester, Earl Ross and Charles Snear all owned property in a residential subdivision known as the Ridge Road Development located in Chincoteague. More than a year after these lots were purchased and after four homes had been constructed, the Corps and the EPA brought suit in the United States District Court for the Eastern District of Virginia against each of these individuals, along with the developer of the Ridge Road Development, alleging that the property to which they held title was once a wetland under the Corps' jurisdiction and that the developer had filled this property without a Corps permit. The government sought a Court order to restore the development to its former condition notwithstanding that the property had been purchased more than a year earlier and homes had been constructed on four of the twelve lots.

After a year of costly legal proceedings the suit was dismissed due to lack of evidence. The cumulative legal expenses of the property owners exceeded $30,000.00 and during the year of litigation they were unable to sell, develop or make any improvements on their land.

4. Mr. Delmas Mears owns a lot located on Chincoteague on which he operates an auto repair business. On November 18, 1983 he received a notice from the Corps advising him that aerial photographs revealed that a wetland which was once located in his backyard in 1977 had been filled without a permit and that he had thirty days to either remove the fill or apply for an After-the-Fact Permit. This area contained approximately .65 acres covered with grass. The Corps claimed that it was at one time a cattail patch. The Corps also gave the same notice of violation to Mr. Mears' next door neighbors, Mr. Williams and Mr. Hall.

Mr. Mears freely admitted that he had added sand over the years since 1968 to a low area in his backyard which previously was a breeding ground for rats and mosquitoes. But, he denied that this property was ever a "wetland".

Mr. Williams and Mr. Hall were not required to remove the fill from their properties after agreeing to pay $500.00 and signing a Consent Order. Mr. Mears, not wanting to pay $500.00, applied for an After-the-Fact Permit.

On reviewing Mr. Mears' application, the Corps noted that most of his property was uplands and that there had been considerable "legal filling" done all around his property. Nevertheless, on May 24, 1985, the Corps denied Mr. Mears' permit, finding:

> [T]he completed project to be contrary to the public interest because of the unnecessary loss of freshwater wetlands and because of the potential for cumulative environmental degradation.

The Corps, acknowledging that it would be of little or no benefit to the environment in the area to require Mr. Mears to remove the fill, instead put him on notice of their intent to refer the matter to the Justice Department for an appropriate civil penalty. As of this date, Mr. Mears is awaiting further Government action.

5. The following case occurred in nearby Chesapeake, Virginia. 1902 Atlantic Ltd. applied for a permit on

April 22, 1981 to fill a man-made borrow pit upon which it planned to build an industrial complex. The borrow pit was created by three man-made enbankments with a small ditch cutting across the center that allowed tide water into the pit. The Corps denied the permit stating that the proposed project was not "water dependent" as required by 40 C.F.R. 230.10(a)(3). 1902 brought suit claiming that the denial of the permit was arbitrary and capricious and that the Corps' action was an unconstitutional regulatory taking. The Court agreed, stating that the Corps' actions not only resulted in a diminution in value of the property, but also denied 1902 all viable economic use of their property. The Court also held the permit denial was arbitrary, capricious and an abuse of discretion and the Corps was ordered to reconsider the permit without imposing the unlawful requirements which exist. *1902 Atlantic Limited v. Hudson*, 574 F.Supp. 1381 (E.D. Va. 1983).

As of this date, 1902 still does not have a permit, and it appears that the Corps has no intention of complying with the District Court's original Order. In the District Court's most recent Order, Judge Doumar stated:

> On September 28, 1983 this Court ordered the Corps to either reconsider the plaintiff's permit application in accordance with the views expressed in its opinion or to commence condemnation proceedings. The Corps chose to do neither. Instead, the Corps effectively considered the application de novo and paid no attention whatsoever to the Court's findings of the fact and conclusions of law. Except for referring to the subsequent administrative proceeding as a rehearing, the Corps completely ignored this Court's order. *The Corps obviously believes that it can totally ignore its prior hearings and reports. The Court specifically finds that the Corps' Report was designed to justify a predetermined result—to deny plaintiff's permit application.* Accordingly, this Court has no choice but to order the current District Engineer, Charles D. Boyd, III, to comply with this Court's order of September 28, 1983 and to reconsider its decision in the light of that hearing, *not as an adversary but as a fair and impartial determination.* [*1902 Atlantic Ltd. v. Boyd*, No. 82-533-N, *slip. op.* at 15, filed Feb. 8, 1985 (Emphasis added)]

Judge Doumar's statement sums up the experiences on the Citizens of Chincoteague with the Corps' implementation of the Clean Water Act. Where it is already predetermined by the Corps' regulations that any alterations to private property are not in the public interest, and where the permitting process in effect allows no permits for the filling of non-inundated wetland areas, any professed fair decision making on the part of the Corps can only be viewed as a sham, heavily biased against the property owner. As such, the total restrictions that the Section 404 permitting process imposes effect an unconstitutional regulatory taking.

IV. THE GOVERNMENT AND ITS SUPPORTING AMICI PAINT THE ENVIRONMENTAL VALUES OF WETLANDS WITH TOO BROAD A BRUSH.

All areas, wetlands and non-wetlands alike, contribute in one way or another to the overall environment. However, the substantial wetlands values claimed by the Government (Pet. Brief at 14, 39), and NWF (NWF Brief at 11, 18, 19) do not exist in all wetlands. To infer to this Court that all wetlands have the same high productivity as alleged in the Petitioner's briefs is misleading. As noted in a Congressional report, "the intrinsic values and ecological service provided by wetlands can vary significantly from one wetland to another and from one region of the country to another", Office of Technology Assessment, *Wetlands: Their Use and Regulations* 37 (1984) (hereinafter "*Wetlands*").

Wetlands *periodically inundated* contribute to some degree in the maintenance of the chemical, physical and biological integrity of the nations waters as alleged. Some of these wetlands act as a filtering system which prevent sediment from runoffs and tributaries from directly entering, polluting and clogging the water bodies which they border. The vegetation in these periodically in-

undated wetlands can act as a breeding ground for fish and wildlife, and because these wetlands are periodically flushed with the waters that they border, detrital export (the transport of decaying organic matter) can occur.

However, the Sixth Circuit's ruling has no impact on the regulation of *periodically inundated* wetlands in the United States. To the contrary, the Sixth Circuit's opinion held that periodically inundated wetlands were subject to regulation under the Clean Water Act. Significantly, the developmental pressures upon these types of wetlands are considerably less because of their location and characteristics. These wetlands exhibit poor soils which are not suitable for foundations and lack percolation necessary for septic tanks and drain fields. In order to raise the elevation sufficiently to avoid the dangers of flooding requires extensive earth moving, which cannot usually be accomplished with conventional machinery. The resulting cost of development of these wetlands can be expected to exceed the economic value of the ground after development, thereby eliminating development pressures. Accordingly, nature has built in a certain degree of protection for its most productive wetlands.

Contrary to the Government's statement that all "wetlands perform the same important function" (Pet. Brief 14), not all wetlands perform important functions and in fact some may constitute a nuisance and a threat to public health. *Wetlands* 37-38. For example, one function which non-inundated wetlands do not perform is detrital export. In a wetland not subject to periodic inundation from adjoining waterbodies, such as those on Riverside's land, detrital export does not take place because of the land barriers which surround the wetland. Also, not all wetlands purify water through hydraulic conductivity. Some forms of wetlands have sapric subsoils which are sticky, plastic and impervious to water. A. Ash et al, *Natural and Modified Pocosins: Literature Syntheses and Management Options*, 10 (1983) (hereinafter "*Natural Pocosins*"). Wetlands with sapric soils tend to retain water instead of permitting percolation

into the soil. The only way water can leave this type of wetland is overland. C. Richardson, *Pocosin Wetlands* (1981). One result is that chemicals, insecticides and other pollutants which wash into these pools tend to collect and become concentrated until a heavy rain washes them into nearby waterbodies causing environmental damage. *Natural Pocosins* 52. Water in wetlands with sticky soil conditions can also become stagnant or in some cases highly acidic, precluding the presence of fish and wildlife. *Id.* at 16.

One life form which thrives under such conditions is the mosquito. W. King, *A Handbook of the Mosquitoes of the Southeastern United States* (1960). Wetlands which are not periodically inundated by adjacent waterbodies provide a natural breeding ground for the mosquito. *Ibid.* Where there is frequent inundation from adjacent waterbodies, fish that feed on the larvae can enter and survive. Also, the frequent inundation tends to flush the larvae out into open waters where they provide food for non-wetland life forms. *Ibid.* Non-frequently inundated wetlands are not subject to the flushing process and many will not support fish. Therefore, the larvae has a much better chance of surviving.

Mosquitoes take a costly toll on the surrounding populations. They spread disease such as malaria and encephalitis, to name a few, along with causing discomfort and lowered productivity to both man and beast. They effect local economies by discouraging the settlement of new homes and business. They also discourage tourism, the industry upon which Chincoteague depends. The most effective method of controlling mosquitoes in the past has been by draining and filling these still water wetlands where they breed. Communicable Disease Control, U.S. Department of Health, Education and Welfare; *Mosquitoes of Public Health Importance and Their Control* (1962). If the Sixth Circuit's holding is not affirmed, mosquito control which is now under state and local control will become increasingly more difficult and costly. New ditching and land filling will be eliminated

and it will be necessary to obtain a Section 404 permit to maintain ditches that were dug at substantial expense under prior Federal and State programs. Considering that thousands of localities must expend tax revenue upon mosquito control, the cost of the economy as a whole is substantial.

Accordingly, while it may be conceded that the inundated wetlands, such as the wetlands that the Sixth Circuit's decision would protect, do perform some of the beneficial functions that the Government alleges, the same cannot be said for all non-inundated wetlands that the Government now seeks to expand its jurisdiction over. In fact, some of these wetlands possess negative qualities which out weigh any contributions which they might make to the chemical, physical and biological integrity of the nation's waters.

CONCLUSION

For these reasons and those stated in the Brief of Respondent Bayview Homes, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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